Iroquois Foundry Systems, Inc. *and* Teamsters Local Union No. 529 a/w International Brotherhood of Teamsters, AFL–CIO. Case 3–CA–20760

February 17, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On August 19, 1998, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Iroquois Foundry Systems, Inc., Waverly, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Elizabeth Mattimore, Esq., for the General Counsel.
Richard Perhacs and *Mark Kuhar, Esqs. (Knox, McLaughlin, Gorhall & Sennett),* for the Respondent.
James N. McCauley, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 27, 1998, in Elmira, New York. The complaint, which issued on December 17, 1997, and was based on an unfair labor practice charge and an amended charge that were filed on June 23 and November 24, 1997, by Teamsters Local Union No. 529, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union) alleges that Iroquois Foundry Systems, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the Act by informing an employee that he had been terminated because of his union activity, and by discharging employee David Rae on about December 26, 1996,[1] and by refusing to allow Rae to retract his alleged voluntary quit. It is alleged that the Respondent engaged in this activity because of Rae's union activity.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

It is alleged that the termination of Rae's employment by the Respondent, on December 26, violated Section 8(a)(1) and (3) of the Act. The complaint alleges both that the Respondent discharged him on that day and, in addition, alleges that the Respondent refused to allow him to retract what it asserts was a voluntary quit by Rae 2 days earlier. The latter allegation has more support from the record herein. On December 24 Rae walked off the job allegedly as a result of a personal tragedy, the death of his brother in a house fire and/or the receipt of a warning for a safety violation. Respondent admits that it refused to reinstate Rae to his employment, but not because of his activities on behalf of the Union. Rather, Respondent defends that its employment manual provides that leaving work without prior permission is considered a voluntary quit, and its long-standing policy is not to reinstate such employees.

The Union filed a petition herein on September 9; at the election conducted on October 24, the Union did not receive a majority of the valid votes counted. The Union, however, filed objections to the election and on December 26 a complaint issued consolidated with the objections that were filed by the Union. On February 11, 1997, the parties entered into a settlement agreement providing, inter alia, that the Respondent would recognize and bargain with the Union.

Rae was employed by the Respondent as a furnace operator on the 1:30 to 10 a.m. shift. He has been employed by the Respondent since 1990. There was testimony about statements and actions by agents of the Respondent that would normally be alleged as 8(a)(1) violations. However, because of the settlement entered into by the parties this testimony is relevant herein only to establish union animus on the part of the Respondent to support the 8(a)(3) allegation herein.

Kenneth Miller, who had been employed by the Respondent as the quality control manager (and, admittedly a supervisor and agent of the Respondent) until October 1997 testified that at management meetings held at the facility prior to the election, Tom Kisloski, Respondent's operations manager and the top man at the facility, told those present that if the Union came in they would close the facility. After the election, Kisloski told his supervisory staff that the Respondent wanted to "purge" the union supporters out of the company because they did not want to go through another union campaign in a year. Kisloski testified that at management meetings after the election he did say that he did not want to go through another union campaign

[1] In finding that the General Counsel established antiunion animus on the part of the Respondent, Members Hurtgen and Brame do not rely on the fact that the Respondent's operations manager decided that a safety incident of December 12, involving employee David Rae, should be a warning and a suspension, rather than a memorandum to Rae's file.

[2] The Respondent failed to produce subpoenaed records regarding employees who left its employ and then attempted to return to work. We agree with the judge that the Respondent had ample opportunity to produce the records at trial.

The judge found that the failure to produce the documents justified an adverse inference that if such evidence had been produced, it would have been unfavorable to the Respondent. Members Hurtgen and Brame find it unnecessary to rely on the adverse inference drawn by the judge. Rather, they find that the Respondent did not rebut the General Counsel's prima facie case.

[1] Unless indicated otherwise, all dates referred to here relate to the year 1996.

because it was too disruptive, but he never said anything about purging employees. Employee Robert Birks testified that on the day before the election, he and Jeff Jones, the maintenance superintendent, and admitted supervisor and agent of he Respondent, were outside the plant, when Jones pointed to an Agway facility across the street that had closed, and said: "When you go to vote tomorrow, this is what happens when a union comes in." Employee Joseph Hall testified that in about late Summer of 1996 Kisloski approached him and said that somebody told him that he was the one "that started this Union bullshit." Hall denied it. Employee Elliot Timm testified that in about September, during a meeting with employees about the union campaign, Kisloski said that the Respondent had a loan program for the employees if they needed money, but it would stop if the Union won the election.

Rae testified that on the day that the petition arrived at the plant, his two supervisors, Gary Frantz and George Braunbeck, shift supervisors, and admitted supervisors and agents of the Respondent, came to where he was working and told him that the Union had filed a petition and that Marty Hall, Respondent's owner, would close the facility and would never let a union in there. On about the following day, Frantz again approached him while he was working and said that Hall would close the facility before he would have a union in the shop. Later that week Rae overheard Ed Henry, Coreroom Supervisor and admitted supervisor and agent of the Respondent, tell some employees in his department that Hall would close the facility before he would let the Union in. Rae testified further that the Respondent, by Kisloski, conducted five or six meetings with the employees at the facility prior to the election. At either the first or second meeting, he said that if they had to bargain with the Union the employees start from zero and might lose everything and might get something back. At the final preelection meeting, Kisloski told the employees that the Respondent was starting a loan program; he had never previously heard of such a benefit.

Counsel for the General Counsel introduced additional evidence of alleged Union animus involving a delay in the setup of a core machine at the plant. Birks, who had been employed by the Respondent as an electrician, testified that about a year before the union petition was filed he heard that Respondent was purchasing a core machine that would cost about $750,000 and would produce enough cores to keep the plant operating. The principal part of the machine was delivered about the time that the petition was filed. He began installing the machine in the beginning of September and devoted all his available time to it. On about the day that the union petition arrived at the plant Jones told him to stop working on the core machine, because if the Union won the election, the plant would close and the machine would be removed. In addition, he was told that all special projects at the plant were on hold until after the election, because the money that was to be used for these special projects would be used for the antiunion campaign and the company's lawyers. After the election, he resumed the installation of the core machine. Joseph Hall, who is employed by the Respondent as a maintenance employee, testified that both Jones, his supervisor, and Kisloski have said in meetings that money spent to install the core machine would be better spent educating the employees about the Union. Timm testified that at a meeting in about July, Kisloski told the employees of the core machine and how great it was. The machine was delivered just before the union petition and at the next meeting, Kisloski told the employees that installation of the machine was on hold and the money was being spent on lawyers' fees. Right after the election, installation of the core machine resumed. Rae testified that he asked Kisloski why installation of the core machine had stopped; "He said that we needed an education more than we needed the core machine at the time."

Admittedly, the Respondent knew that Rae was an active union supporter. Beginning in September, he wore "Vote Teamster" pins and hats to work every day and he was a union observer at the election. However, there is no evidence of any 8(a)(1) activity that was directed solely at him and his employment status.

Rae, who was on the safety committee at the facility, was written up on a number of occasions for safety violations or perceived safety violations. The first one occurred in September 1994. On that day there was a large pile of chips (shavings from the cast iron castings) at the furnace. Two supervisors came by and said hello. Rae jumped onto the pile of chips and said: "Here's something you don't see every day." He was written up for a safety violation because of that incident. In January 1995 he received a warning for responding "in a hostile manner" to a comment made by a supervisor. The next writeup he received for a safety violation was a memorandum dated September 17 for an incident that occurred on September 11. Employees in his job classification are required to wear dark safety glasses because the burning iron is so bright. On that day, Rae lifted the safety glasses away from his eyes for a short time "to see what was going on" and Braunbeck saw him and wrote him up for the safety violation. The next writeup was a memorandum that was issued to Rae on November 6 for a situation that occurred the prior day. This memorandum states:

> On 11–5–96 Iroquois Foundry Systems implemented a safety program to protect our employees from any future injuries that may occur. It is mandatory that our iron pourers and melt deck operators are to wear hard hats and face shields at all times when pouring iron or while on melt deck. Dave had questioned why we had implemented this safety program. After explaining to Dave that we are working towards improving our compensation insurance costs, Dave became more understanding and agreed to wear the safety equipment we had issued to him.
>
> Dave had stated when using plastic face shields when slacking the furnace, the face shields melt down.
>
> Note: Supervisor has ordered new steel mesh face shields to correct this problem.

Rae testified that he had never previously heard of the rule requiring the furnace operators to wear the hard hat and safety glasses, and he spoke to Braunbeck about it. He complained that the glasses melted in the heat at the furnace and Braunbeck said that the Respondent would order steel mesh glasses.

Rae received a warning slip for an incident that occurred on November 12. The warning states that Braunbeck and Frantz saw Rae operating his furnace without his hard hat and face shield. The warning states further: "Dave has received two memorandums pertaining to the proper use of safety equipment. If this incident occurs again Dave will receive a second warning and possibly a 1–3 day suspension." under employee's comments, the warning states:

> Employee refused to sign. Dave stated to Gary Frantz and myself that we are making his job intolerable to the point that he might have to quit.

Rae testified that he lifted up the darkened face shield so that he could see better. He was afraid that he could trip over the rebar and fall into the furnace because it was difficult to see with the face shield down. Additionally, he testified that he did not tell Braunbeck and Frantz that he might have to quit; he said that they were trying to make him quit.

Due to mechanical and furnace problems, the facility ceased operations for about 9 days, resuming operation on about December 21. Additionally on December 21, Rae's brother died in a fire. On that same day, after investigating the scene of the fire, Rae received call from Mike Evans, the supervisor of the melt deck at the facility, telling him that the furnace was repaired and asking if he could return to work that night. Rae said that he had a personal problem, but would be in at about midnight that evening, and he reported for work shortly before midnight, December 21/22 and worked until about noon on December 22, slowly warming the furnace. He reported for his regular shift at 1:30 a.m. on the next day, December 23, and worked the entire shift. He reported to work on his regular shift on December 24 and everything went normally until about 8 a.m., when Braunbeck told him that Frantz wanted to speak to him. When he got to Frantz' office, Frantz handed him a warning slip for an incident that allegedly occurred on December 12. It says that it is his second written warning and states:

> Safety Violation—on 12/12/96 Dave was observed by Jeff Jones filling a ladle of iron without the use of the proper safety equipment that has been provided for his safety.

Under "Suggested corrective action" it states: "Dave has received two memorandums [sic] and one written warning pertaining to safety. This being Dave's 2nd written warning 4th offense pertaining to safety, Dave will receive a 3 day suspension days off." Rae testified that upon reading this warning, he became "very distraught" and it put him "over the edge . . . trying to figure why these guys are trying to give me such a hard time for . . . nothing that was serious." Rae then said: "Gary, that's all I need to know" and started to walk out; Frantz asked him if he wanted to talk about it, and Rae said, "No, I don't want to talk about it. I'm sick of Jeff Jones' shit." After leaving Frantz' office, he realized that in his state of mind and condition he should not work: "I know that if . . . you're in that kind of position you can't work because it's not safe." After thinking it over further, he decided that he as too upset to work and went to tell Frantz that he was leaving. When he could not locate him, he told Audie Fisher, a production supervisor, to tell Frantz and Braunbeck that he was distraught over his brother's death and was "sick and tired" of the way the Respondent was operating the facility regarding his 3-day suspension and was so upset that he had to leave. Fisher did not respond, and Rae left. After leaving the facility, Rae went to the home of Doug Dennis, a union representative, and told him what happened. Dennis told him to go back to work because the Respondent could say that he quit.

December 25 was a holiday, and Rae reported for work at about 1 a.m. on December 26, but he could not find his timecard. When he asked Frantz for his timecard, Frantz said that they have a problem: "Because you left the 24th without permission, it was considered that you voluntarily quit." Rae said that he had not quit, and Frantz told him to return at 10 to talk to Kisloski about it. At about that time, Rae met with Kisloski, Frantz, Braunbeck and some of the supervisors. He testified that Kisloki said that they felt that he left work without permission. Rae said that he was distraught over his brother's death, that he tried to find Frantz to tell him that he was leaving, but did tell Fisher (who was at the meeting) and he asked to be allowed to return. He was told that they would discuss it and get back to him with an answer. About 45 minutes later he was called back into the room with the same people. Kisloski said:

> We've discussed this and we decided that we are going to go by the book because you have complained about double standards so we're going . . . to show you that we don't practice double standards here, and we're going to go by the book[2] and consider that you voluntarily quit, so you are terminated.

Fisher testified that on December 24 he was seated at a table outside of Frantz' office; Rae came out of Frantz' office and said: "I'm sick of Jeff Jones' bullshit" and left the area. About 10 or 15 minutes later, Rae returned to the area and asked Fisher where Frantz and Braunbeck were and Fisher told him that they had gone back to the production floor. Rae, who appeared to be upset, then said to Fisher: "Well, if you see him tell him that I was distraught, not because of my brother's death, but because of the way this fucking place is being managed."

Kisloski was the principal witness testifying in support of the Respondent's decision not to allow Rae to return to work on December 26. Counsel for the Respondent commenced his questions to Kisloski on this subject by asking him if there had been incidents at the facility involving employees other than Rae who had left without permission and attempted to return to the Respondent's employ. Counsel for the General Counsel and counsel for the Charging Party objected to this line of testimony because the Respondent had not complied with a subpoena request for this information. The Respondent defended that it did not have an adequate opportunity in which to respond. Paragraph 9(b) of the General Counsel's subpoena, which requested information regarding employees who left Respondent's employ and subsequently attempted to return, was mailed on May 13, 1998, and received by the Respondent on Friday, May 15, 1998. Counsel for the Respondent received a copy of the subpoena on Monday, May 18, 1998. The trial herein took place on Wednesday, May 27; Monday, May 25, 1998, was a holiday, Memorial Day. Counsel for the Respondent defended the noncompliance with the subpoena on the ground that the Respondent did not have an adequate opportunity to collect the requested documents. He stated that there were approximately 600 personnel files and only 2 office employees available to find and collect these documents. After arguments by all parties, I found that the Respondent had 12 calendar days or 7 working days to locate this information. Even if there were only two office employees who could examine these files (and the Respondent never explained why it could not temporarily assign one or more other individuals to assist them) each employee would have to inspect only about 20 files daily for all to be inspected, and this could be done simply as they would only have to look to see if there was a memo in the file stating that the employee had left Respondent's employ without permission and subsequently attempted to return. Having found that the Respondent could have complied with the subpoena, I did not allow Kisloski to testify

[2] Respondent's Employment Guidelines and Procedures Manual, which Rae signed as having received on January 2, 1995, provides: "*Leaving Company premises during working hours* without permission of a Supervisor. This behavior is considered a voluntary quit.

about the information covered by the subpoena under *Bannon Mills, Inc.,* 146 NLRB 611, 633. However, as the subpoena only covered the time period August 1 to the present time, I, reluctantly, permitted Kisloski to testify about situations that may have occurred prior to August 1.

Kisloki testified that since about 1993, about 20 percent of the employees who walked out without prior notification attempted to return. He estimated this number to be about 30. He did not rehire any of these individuals because it was against their policy as set forth in the manual. When he and the other supervisors met with Rae at his request on December 26, Rae said that the Union was at the facility because of the double standard that was, at times, employed in the shop. After Rae left, they caucused for about 5 minutes. It was Kisloski's decision not to reinstate him solely because he was in violation of the Respondent's manual. It had nothing to do with his union activities. When Rae returned to the meeting, he told Rae that he could not be reinstated because that would create a "double standard" as Rae had referred to in his defense. Kisloski did not say that they were "going by the book."

The events of December 24 and 26 resulted from the warning that Jones issued to Rae for the events of December 12. The evidence establishes that Rae did not receive it until December 24 because of the plant shutdown due to difficulties with the furnace. Jones testified that on December 12, he observed Rae performing certain work without having his visor down over his face as is required by the plant's rules. He approached Rae and told him that he was in violation of the plant's safety rules because he was not using the protective visor; Rae asked him if he had anything "fucking better to do" than to harass him. Jones said: "Dave, don't talk to me that way." Rae said: "Okay. I won't talk to you at all," and Jones said, "Don't talk to me like that either. I'm trying to tell you that you're in direct violation of safety rule, and I want you to put the visor down, and that's that." Rae then put his visor down and Jones reported the incident to Kisloski. Whereas Jones was going to write a memo to the file about the incident, Kisloski made the decision to make it a warning. Rae testified that the incident described in the warning occurred shortly before the end of his shift, which was a period when the first shift employees are arriving and the individual who operates the furnace often questions him about anything that he needs to know or do. On the day in question, as he was taking the last ladle or two of iron out of the furnace, the laborer asked him a question, and Rae lifted up his mask so that he could see and speak to him. As he did this, he noticed Jones looking at him from his office.

An incident occurred in March 1997 where Rae accidentally met Miller in a nearby town. In the course of their conversation, Miller is alleged to have made some statements that are the sole support for the 8(a)(1) allegation herein, and are alleged to support the General Counsel's 8(a)(3) allegation herein. Miller, the quality control manager, worked for the Respondent for about 9 years until October 1997, when he left Respondent for a better job elsewhere. Miller's testimony about this meeting is difficult to follow and is generally unreliable. On the other hand, Rae's testimony about this meeting is straightforward and direct. He testified that he was driving to Corning, New York, for an unemployment hearing with the Respondent and he saw Miller. When they both stopped at a traffic light, Rae motioned to him to pull off the road and talk, and Miller did so. Rae told Miller that he was going to the unemployment hearing and "I wondered if he thought that . . . I was let go because of the union stuff" and asked if he would be a witness for him. Miller hesitated and said that he wasn't there and would not go to court for Rae because he could lose his job. But Miller also said, "something to the effect if the right person asked the right people the right question that he'd have to say yes, that you were let go because of union activity." That was the extent of the conversation. Miller's testimony about this meeting is difficult to follow. In answer to questions from counsel for the General Counsel, Miller testified that they met by chance and Rae asked if he would be a witness for him at a hearing, which Miller assumed was the unemployment hearing. He was next asked:

> Q. Did you respond to his request?
>
> A. I don't think it, it in as far as saying I would testify, no.
>
> Rae then said something about being fired because of his Union activity. He was asked:
>
> Q. And what did you say?
>
> A. Nothing there that I can remember.
>
> Q. Okay. And did you make any statement to Mr. Rae about a question that could be asked?
>
> A. He had—well, Dave, like I say, raised the question about his union activity. And I made the statement he'd just have to—direct questions would have to be asked.
>
> Q. Can you recall to the best of your ability what you said to him?
>
> A. Not really. It's—I mean it's been so long.

Miller was then shown a statement about this meeting that he apparently signed for Kisloski. He testified that he remembers talking to Kisloski about the meeting, but could not specifically recall the statement, although he recognized his signature. In answers to questions from counsel for the Respondent, Miller testified that at the meeting with Rae, Rae told him that he was treated unfairly because of his union activity, and Miller never said that he was not taken back because of his union activity. What he said was that Rae would "just have to ask the right questions." Miller was then shown the statement that he gave to Kisloski, which states that he gave Rae directions to the unemployment hearing, but that "No other comments were exchanged, and the subject of Rae's departure from company employment was not discussed." His testimony about this statement and the affidavit he gave to the Board where he said: "I told him that if the right question was asked I would answer," is so disjointed and confusing as to be worth no further comments. However, Miller did respond clearly and directly to the following questions from counsel for the Respondent:

> Q. When you were at Iroquois Foundry, you were not Mr. Rae's supervisor, were you?
>
> A. No.
>
> Q. Okay. When the decision was made to treat him as having quit or abandoned his employment and not hire him back, you were not part of that decision?
>
> A. No.
>
> Q. Did you ever discuss that decision with Tom Kisloski or any other supervisor?
>
> A. No, not that part of it.
>
> Q. Okay. So you would have no firsthand knowledge, would you of any aspect of the decision not to reinstate Mr. Rae; is that correct?
>
> A. Right . . . Well, I wasn't part of the decision making.

Another bit of tangential testimony concerned the alleged termination and subsequent rehiring of an employee named Leslie Porter who was engaged in an altercation requiring police assistance with one of Respondent's vice presidents. Rae testified that Porter first returned to the facility about a month after the altercation; "He's like a computer consultant I believe. Comes in and helps the computer system." Prior to the altercation he was at the facility on a daily basis; afterward, he was there less than 1 day a month, working on the computers, although he does not believe that he is an employee of the Respondent. Kisloski testified that prior to the altercation, Porter was an employee of a sister company, Iroquois Tool, and worked at a different building than the Respondent. At the present time, he is not an employee of the Respondent. He owns his own company that they use for computer repair. On rebuttal, Rae testified that in about September, while he and some other employees were sitting in an office at the facility waiting for their pay checks, he noticed an attendance book on the desk and he opened it and saw Porter's name with a notation: "Rehire 8/14/96."

IV. ANALYSIS

The initial allegation herein is that the Respondent violated Section 8(a)(1) of the Act when Miller informed Rae that he had been terminated because of his union activity. Under different circumstances this could have been a violation as it occurred in March 1997 and Miller remained a supervisor and agent of the Respondent until about October 1997. As stated above, Miller's testimony about the meeting is so unreliable as to be totally disregarded. Rae testified that Miller told him "something to the effect if the right person asked the right people the right question that he'd have to say yes that you were let go because of the union." Conjecture such as this should not be the sole basis for a violation. Further lacking in believability is how Miller could have made this statement (or how Rae could have believed it) when he had absolutely nothing to do with the Respondent's decision not to take Rae back on December 26 as Rae knew. I therefore recommend that this 8(a)(1) allegation be dismissed.

The sole remaining issue is whether the Respondent's refusal to allow Rae to return to work on December 26 violates the Act. Under *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the initial burden to establish a prima facie case sufficient to support the inference that the individual's protected conduct was a "motivating factor" in the employer's decision to terminate him. If the General Counsel has satisfied this requirement, the burden then shifts to the employer to establish that the employee would have been discharged "even in the absence of the protected conduct." Counsel for the General Counsel has clearly sustained her initial burden herein. Rae was an active union supporter and the Respondent was aware of his actions. Additionally, counsel for the General Counsel has established union animus through substantial credible testimony of numerous threats to close the facility if the Union won the election as well as similar credible evidence that the Respondent delayed the installation of the core machine because of the union activity at the plant. Finally, the fact that Kisloski decided that the incident of December 12 should be a warning and a suspension, rather than a memorandum to Rae's file as was the intent of Jones, further supports the argument that the Respondent's union animus extended to Rae.

The final issue therefore is whether the Respondent has satisfied its burden that it would not have allowed Rae to return to employment on December 26 even absent his union activity. I find that it has not. Initially it should be noted that there were extenuating circumstances herein so that nobody would have blamed the Respondent for exhibiting some flexibility in reinstating Rae. His brother had died a few days earlier and, since December 25 was a holiday, he was not absent for a full workday. More importantly, because the Respondent did not comply with the subpoena as discussed above, the sole evidence supporting its defense herein is Kisloski's testimony that, prior to August 1, the Respondent did not rehire any of the approximately 30 employees who walked out and attempted to return. I found this testimony incredible and unconvincing. All the parties were well aware of the fact that the principal issue herein was the lawfulness of the Respondent's refusal to permit Rae to return to employment on December 26, 2 days after he had walked out. The importance of this issue apparently motivated the General Counsel to subpoena the Respondent's records of employees who left its employ and then attempted to return in order to determine whether there was disparate treatment in Respondent's refusal to permit him to return on December 26. As discussed above, I have found that 12 calendar days and 7 working days was adequate time for the Respondent to compile these documents. In addition to foreclosing Kisloski from testifying about this subject, I find that the Respondent's failure to produce these documents, the best evidence of the Respondent's past practice in treating employees who attempted to return to the Respondent's employ, justifies an inference that if such evidence had been produced, it would have been unfavorable to the Respondent. *J. Huzinga Cartage Co, Inc.*, 298 NLRB 965, 970. In *NLRB v. Shelby Memorial Hospital Association*, 1 F.3d 550, 563 (7th Cir. 1993), the Court stated: "The failure of an employer to produce relevant evidence particularly within its control allows the Board to draw an adverse inference that such evidence would not be favorable to it." This rule is even more applicable herein because the Respondent failed to produce the evidence pursuant to a subpoena. In *Auto Workers v. NLRB,* 459 F.2d 1329 at 1338 (D.C. Cir. 1972), the court stated:

> The reason why existence of a subpoena strengthens the force of an inference should be obvious. If a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he has some good reason for his insistence on suppression. Human experience indicates that the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party.

Because I have discredited Kisloski's testimony regarding Respondent's experience with employees who left its employ and attempted to return, and would apply an adverse inference to the Respondent's failure to produce the subpoenaed documents on the subject (pars. 9(b) and 10 of the subpoena), I find that the Respondent has not satisfied its burden under *Wright Line*. I therefore find that the Respondent's refusal to permit Rae to return to its employ on December 26 violates Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint.

4. By refusing to permit employee David Rae to return to work on December 26, 1996, the Respondent violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that the Respondent unlawfully refused to reinstate Rae upon his request on December 26, 1996, I shall recommend that the Respondent be required to offer him immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. It is also recommended that the Respondent make him whole for any loss that he suffered as a result of he discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Iroquois Foundry Systems, Inc., Waverly, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from refusing to reinstate, or to otherwise discriminate against, its employees because of their union activities, or in any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this decision, offer David Rae full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Rae whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth above in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to reinstate Rae, and within 3 days thereafter notify him in writing that this has been done and that the refusal to reinstate him will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination or copying all records and documents necessary to analyze and determine the amount of backpay owed to Rae.

(e) Post at its facility in Waverly, New York copies of the attached Notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places here notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to reinstate employees, or otherwise discriminate against our employees, in retaliation for their support for Teamsters Local Union No. 529, affiliated with International Brotherhood of Teamsters, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer David Rae immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Rae whole for any loss of earnings and other benefits that he suffered as a result of our refusal to reinstate him to employment on December 26, 1996.

WE WILL **,** within 14 days from the date of this Order, remove from our files any reference to our refusal to reinstate Rae and WE WILL , within 3 days thereafter, notify him that this has been done and that it will not be used against him in any way.

IROQUOIS FOUNDRY SYSTEMS, INC.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."